Legal Representatives of Manak Mal & Anr. vs. Smt.Mathura & Anr.

SB Civil 1st Appeal No.41/1984

Date of Order: 17th April, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD

Mr.Manish Shishodia for the appellant/s.
Mr.Jitendra Chopra for the respondent/s.

Heard learned counsel for the parties.

This is an appeal filed by the appellants against the judgment and decree passed by the District & Sessions Judge, Balotra, dated 28.05.84, in civil original suit No.07/1980.

A suit was filed by the respondent- plaintiffs, alleging inter alia that a plot was purchased by them in Mohalla Kangalpura, alias Kalyanpura, Barmer from Thakur Khumsingh - Achal Singh on 08.10.1950 for a consideration of Rs.500/-. The defendants No.1 and 2 , appellants, were the real brothers of plaintiff Mathura the widow. It was claimed by plaintiff that Mathura having become widow at a very early stage of life and her son Nemichand , plaintiff

No.2 was a minor. At that time since the appellants defendants were in fiduciary possession, they used to assist the plaintiff their sister and the plaintiff No.2 their nephew. In 1979 plaintiffs wanted to construct a house on the plot in question and an application was moved before the Municipal Board on 17.11.1979 for permission . At that time they demanded the original document from the appellant brothers but they started avoiding. On 15.01.80 they started physically occupying the plot in question by raising construction. The matter was reported to the Municipal Board.

In relation to the application of the plaintiff , an objection was raised by the appellants. Thus this became clear that the defendants wanted to grab the plot in question. Therefore, the suit in question was filed for the reliefs claimed in the plaint for possession, injunction and mesne profits. The defendants denied the claim and contested the suit and averred that the plot was purchased by the appellant- defendants. The purchase was benami. They had purchased many plots from Thakur Khumsingh Achal Singh. Since the other plots were purchased at a concessional rate, therefore, considering that the Thakur may not agree to sell more plot to them therefore, the pot in question was purchased in the name of Mathura, plaintiff, benami.

The defendants also claimed that they are in possession of the plot since 30 years and their tenants are living there. The appellants are real owners and a false report was lodged against them by the plaintiff before the Municipal Board. The suit is time barred. The basic case of the defendant was that the plot was benami and its consideration was paid by them. On the basis of the pleading of the parties, the following issues were framed:-

> "1- आया विवादग्रस्त प्लोट दिनांक 8-10-50 को वादीनी नं. 1 के नाम बेनामी खरीदा गया था व इसकी धनराशि स्वयं प्रतिवादीगण ने अपनी ओर से अदाकर स्वयं के लिये खरीदा था व प्रतिवादीगण ने अपनी ओर से अदाकर स्वयं के लिये खरीदा था व प्रतिवादीगण का इस प्लोट पर स्वामी की हैसियत से निरन्तर कब्जा चला आ रहा है ?
>
> 2- आया दिनांक 15-1-80 के करीब प्रतिवादीगण ने विवादग्रस्त प्लोट पर छीणे डलवाकर छीणें खड़ी करना शुरू कर अनाधिकृत कब्जा किया ?
>
> 3- आया वादीगण माफिक दावा 70/- रूपये माहवार बतौर मीन प्राफीट पाने के अधिकारी हैं ?

4- आया वादीगण माफिक दावा निषेधाज्ञा व असालतन कब्जा पाने के अधिकारी हैं?

5- आया दावा अन्दर म्याद है?
6- आया मुतनाजा प्लोट पर प्रतिवादी का गत 12 वर्ष से प्रतिकूल कब्जा है ?

7- आया वाद पत्र पर वादीनी मथुरा के हस्ताक्षर नहीं हैं इसका वाद पर क्या असर हैं ?

8- दादरसी ?"

The most important issue in this relation is issue No.1 which relates to Benami. The trial court has taken note of various Supreme Court decisions wherein the Hon'ble Supreme Court has held that suspicion , however strong , cannot take the place of proof. In Hindu families, property belonging exclusively to a female member is normally managed by the male member of the family. The benami transaction has to be proved by positive evidence and after taking note of the cases decided by the Hon'ble Supreme Court , the trial court considered that there is a receipt showing some transaction between the parties. There are two such writings , one in a bahi which has many pages but only one page has been consumed in this regard. The writing of both the documents is said to

be of the same person but in that the dates which are given in Vikram Samwat are different . The trial court taking note of this discrepancy, has come to the conclusion that there are 30-40 leaves in a bahi and if only one leaf is used then there is a suspicion about the writings.

The trial court has said that when the dispute arose before the Municipal Council , these documents were not produced by the defendants in Municipal Council. This shows that until then the defendants had not by then conscious of such documents. The witnesses produced in relation to these two writings are the witnesses have been held to be unreliable so much so that PW/3 Sita Ram has been quoted to say that the plot in question earlier belonged to Mathura and Nemichand plaintiffs, and at the time of writing of Ex.A/1 the accounts were settled and the plot was given to Manakmal by Mathura in lieu of the earlier counts. These statements of the witnesses of the appellants-defendants have not been relied on by the trial court and he has been held to be a false witness. The trial court has further gone on record to say that the defendants have not been able to produce that kind of evidence which is required to be established in benami transactions.

The trial court has noticed that when in Samwat 2003 the plot was purchased in the name of Mathura then there is no occasion in Samwat 2014 to get a writing written. The writing is in a bahi which contains 30- 40 pages and in 27 years only one incorporation has come in that.

The trial court has relied on the testimony of PW/1 Mathura wherein she says that she has sold her ornaments to purchase the plot in question. The case of the appellant further that the plots were purchased on concessional rate have not been believed because in Ex./5 it has been written that the plot has been sold at the market price. The reason given for purchasing the plot in the name of Mathura was that the appellant had already purchased four plots. Therefore, fifth plot may not be sold to them by Thakur but when the inscription show that it was at the market price , this explanation of the appellant regarding concessional price has been rejected by the trial court. Apart from this, two documents have ben filed by the defendant Ex.A/6 and Ex.A/7, rent notes. Rent note Ex.A/6 is in the name of Mansukh Mali . He has not been produced. Ex.A/7 is in relation to Rawta, PW/6. His case is that he is an agriculturist attached to Thakur and he used to use the plot while he used to visit the market, for parking his cart. The trial court has rejected it on

the ground that an agriculturist of Thakur would not need the plot to park his cart. These documents were not filed by the appellant before the Municipal Board and, therefore, these are the documents which are post-dated documents and have been written in Samwat 2024.

The adverse possession has not been accepted by the trial court on the ground that it was in 1980 that the first animus was shown by the appellants and soon after that the suit was filed. The report of the Sanitary Inspector appears to be false according to trial court because no notice was issued in the name of the respondent in that regard. The most important finding of the trial court in this relation is that the defendants have filed the income tax return and in that return they have not shown the property. Further there was a partition in between the two brothers in Samwat 2016-17. There was a writing in this relation. If this plot was also the part of division in between the brothers then it should have found mention in writing. That writing has not been produced before the court and in that relation the trial court has observed that its not filing has consequences. If that writing has not been filed it goes against the defendants and it should be presumed that the plot was not considered by both the brothers to be theirs and they considered it to be of

Mathura their sister, merely because the sale deed remained with brothers, it cannot be said that the same was benami. In this regard the findings have gone against the defendant -appellants.

Issue No.,2 regarding mesne profits, the trial court has held that about Rs.10-/ per month should be the mesne profit because of the various factors. Issue No. 4 relating to assertion of the title by the defendant on 05.01.80 it was held that the plaintiffs are entitled to claim actual possession The adverse possession also was not accepted to be that of the defendants and therefore, issue No.5 and 6 were held against the defendants. Thus the suit was decreed.

The learned counsel for the appellant stressed that a widow sister was not in all probabilities to be able to purchase a plot that was purchased, as stated by the appellant and that being the position, the findings on issue No.1 should not have been held against the appellant. They were the persons who held the sale documents in their possession and they managed the property through -out and in that view of the matter, they were the real owners.

Per contra, the learned counsel for the plaintiff respondents stressed that the findings of the trial court is supported

by cogent evidence. The income tax papers are conclusive , so also the non-production of the paper of partition in between the defendants No. 1 and 2. Fabrication of the rent receipts documents goes a long way to show that it was not a relevant document. No accounts have been produced by the defendants to establish that they were the benami holders of the property.

I have considered the rival submissions and have given my thoughtful consideration.

The question of benami has been decided by the trail court after considering the entire evidence in which the Income Tax Returns of the defendants have been considered where this property was not included. So also the partition papers in between the brothers do not take note of this property. Thus, the brothers have excluded this property from their account. If that be so, then the title document being in the name of the plaintiffs goes a long way. The fabrication of the rent deed and one in bahi goes to show that the defendants were out and out to create the documents in their favour but they failed. It cannot be said that the plea of benami has been established by them. In this regard it cannot be said that trial court in any way misdirected itself in deciding the suit in question.

There is no force in the appeal. The appeal is, therefore, dismissed.

(BHAGWATI PRASAD), J.

L.George4